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No. 06-1321

IN THE

Supreme Court of the United States

MYRNA GOMEZ-PEREZ,
Petitioner,

v.

JOHN E. POTTER, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF THE *AMICUS*[1]

Amicus curiae, the National Treasury Employees Union (NTEU), is a federal sector labor organization representing approximately 150,000 federal employees in 31 agencies and departments nationwide,

[1] The parties have consented to the filing of this brief, and their letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

including the Internal Revenue Service, United States Customs and Border Protection, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, and the Transportation Security Administration. NTEU routinely represents the legal interests of federal employees through the collectively bargained grievance-arbitration process, in administrative forums, and in federal court. Indeed, NTEU has frequently been a party or *amicus* before this Court on issues of vital interest to federal employees.[2]

NTEU and its membership have an important stake in the outcome of this case, which will determine whether federal workers will continue to enjoy their long-standing right to pursue claims alleging retaliation directly in federal district court under the Age Discrimination in Employment Act, 29 U.S.C. § 633a (ADEA). The First Circuit's decision[3] would deny federal employees this right, relegating these important claims to a variety of administrative forums subject, in most cases, to unreviewable prosecutorial discretion or to the union-controlled negotiated grievance-arbitration procedure. If allowed to stand, the decision not only would undermine the public policies that underlie the ADEA, but would

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[2] *See, e.g.*, *Whitman v. Dep't of Transp.*, 126 S. Ct. 2014 (2006); *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006); *NASA v. FLRA*, 527 U.S. 229 (1999); *National Fed'n of Fed. Employees, Local 1309 v. Dep't of Interior*, 526 U.S. 86 (1999) (NTEU attorneys represented union); *Gilbert v. Homar*, 520 U.S. 924 (1997) (NTEU attorney presented argument as *amicus*); *United States v. NTEU*, 513 U.S. 454 (1995); *NTEU v. Von Raab*, 489 U.S. 656 (1989); *Bowsher v. Synar*, 478 U.S. 714 (1986).

[3] The First Circuit's decision is set forth in the appendix to the petition for certiorari, at 1a-10a.

also result in inefficiencies, duplicative litigation, and potentially conflicting results when employees who seek judicial review of their underlying age discrimination claims are forced to pursue their retaliation claims in a separate administrative forum.

As the federal workforce ages, meaningful protection from age discrimination, including protection against retaliation, is becoming increasingly important to NTEU and its members. Accordingly, NTEU files this brief in support of the petitioner, urging reversal of the First Circuit's decision below.

SUMMARY OF ARGUMENT

I. The First Circuit's decision that the ADEA does not afford federal employees a statutory remedy for reprisal, including the right to raise such claims in district court, defies congressional intent and is inconsistent with the practice that has been followed in the federal sector for more than 30 years. When Congress extended the ADEA to the federal sector in 1974, except for claims arising under Title VII, federal employees had only the limited employment rights granted them by civil service regulations and executive orders. Those civil service rules provided only for administrative challenges to "adverse actions" (removals, suspensions of over 30 days, reductions in rank or pay, and furloughs). Because retaliation is most commonly accomplished through other methods (including, among others, imposing unfavorable working conditions, making significant changes in job duties, and denying promotions and other benefits), it is inconceivable that Congress intended to rely upon these general civil service regulations to accomplish its goal of removing barriers to the employment of older workers in the

federal sector. Rather, as every federal agency responsible for the administration of the relevant laws has concluded, when Congress extended the ADEA to the federal sector, it provided federal employees with the right to challenge reprisal directly under the ADEA, in federal district court.

II. Four years, after it extended the ADEA to the federal sector, Congress reaffirmed the importance of federal employees' statutory rights under the ADEA to challenge all forms of age discrimination, including reprisal, when it enacted the Civil Service Reform Act of 1978 (CSRA). While the CSRA created a new system of administrative remedies that federal employees could use to challenge personnel actions taken against them, it expressly preserved their pre-existing statutory right to direct judicial review under the anti-discrimination statutes, including the ADEA. The preservation of these judicial remedies is further evidence that Congress has consistently recognized the importance of ensuring access to federal district court for victims of all forms of invidious discrimination, including reprisal for filing age discrimination complaints.

III. The First Circuit's determination that the ADEA does not protect federal employees against reprisal for filing age discrimination complaints would seriously erode the enforcement of the ADEA in the federal sector and create significant practical difficulties. The current administrative remedies provided by the CSRA do not adequately protect against retaliation because, except in the limited category of "adverse actions," individual employees have no control over the pursuit of their reprisal claims and judicial review is unavailable. Further, large segments of the federal workforce would have

no remedy at all for retaliation related to age discrimination claims because they are excluded from some or all of the protections of the CSRA. Finally, the First Circuit's decision would create an unwieldy and duplicative process under which federal employees challenging age discrimination in district court would have to pursue their related reprisal claims in another forum, thereby raising the risk of conflicting resolution of similar issues in related cases. For these reasons, and for the reasons set forth in the petitioner's brief, the decision of the First Circuit should be reversed.

ARGUMENT

I. CONGRESS MUST HAVE INTENDED TO PROVIDE EMPLOYEES WITH PROTECTION AGAINST RETALIATION WHEN IT EXTENDED THE ADEA TO THE FEDERAL SECTOR IN 1974 BECAUSE SUCH PROTECTION WAS NOT AVAILABLE EXCEPT IN VERY LIMITED CIRCUMSTANCES UNDER THEN-EXISTING CIVIL SERVICE REGULATIONS

Congress amended the ADEA in 1974 to extend the Act's prohibition on age discrimination to the federal sector workplace. *See* Fair Labor Standards Amendments, Pub. L. No. 93-259, § 28, 88 Stat. 55, 79 (1974). As amended, the ADEA provides that "[a]ll personnel actions affecting federal employees . . . shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a). In expanding the ADEA to the federal workforce, Congress intended to "remove discriminatory barriers against employment of older workers in government jobs. . . ." H.R. No. 93-913, *reprinted in* 1974 U.S.C.C.A.N. 2811, 2850.

Providing effective protection against retaliation is critical to removing discriminatory barriers against the employment of older workers, just as it is essential to achieve the purposes of other anti-discrimination laws. Indeed, it is NTEU's experience that federal workers often—and with good cause—fear reprisal for asserting a wide range of statutory rights and will refrain from doing so unless they are assured of meaningful legal protection against retaliation.

As we show below, when Congress extended the ADEA to the federal sector in 1974, existing civil service regulations did not provide a full remedy for retaliation except in connection with claims filed under Title VII. *See* 37 Fed. Reg. 22,717 (Oct. 21, 1972). In fact, then-existing civil service protections covered a limited universe of employment-related decisions, and they did not encompass many of the most common methods through which reprisal is effected. *See* 5 C.F.R. Pt. 752 (1970). It is inconceivable, therefore, that the 1974 Congress did not intend to provide federal employees statutory protection against retaliation for filing age discrimination complaints. The decision of the First Circuit, accordingly, must be reversed.

A. At the time Congress extended the ADEA to the federal workforce, federal employment was governed by the "haphazard arrangements for administrative and judicial review of personnel actions" that preceded the enactment of the Civil Service Reform Act of 1978 (CSRA). *United States v. Fausto*, 484 U.S. 439, 444 (1988). These arrangements were part of the much-criticized "'outdated patchwork of statutes and rules built up over almost a century' that was the civil service

system." *Id.* at 444 (quoting S. Rep. No. 95-969, at 3 (1978)); *see also id.* at 445 (quoting S. Rep. No. 95-969, at 9) (appeals processes criticized as "lengthy" and "complicated," and judicial review was "wasteful and irrational," yielding varying results on the same or similar matters).

Under that pre-CSRA system, employee appeals of agency personnel actions (other than claims alleging discrimination in violation of Title VII) were governed by Executive Orders 10,987 and 11,491, as well as by regulations promulgated by the Civil Service Commission (CSC). *See* E.O. 10,987 (Jan. 17, 1962); E.O. 11,491, § 22 (Oct. 29, 1969); 5 C.F.R. Pt. 752 (1970). The appeals system was designed by the Executive Branch and, unlike the current statutory civil service system, could be unilaterally revoked or modified by the President. As crafted by the Executive Branch, this system afforded federal employees very limited opportunities to secure outside review of employment actions taken against them. At best, employees could appeal personnel actions with the CSC, but only if they had been subjected to one of four specified "adverse actions" (*see* 5 C.F.R. § 752.104(a) (1970)),[4] i.e., a removal, suspension for more than 30 days, furlough without pay, or reduction in rank or pay. *See* 5 U.S.C. § 7511(2) (1970); 5 C.F.R. § 752.201(b) (1970). Many

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[4] At the time the ADEA was extended to the federal sector, adverse actions could not be challenged through a negotiated grievance procedure. *See* E.O. 11,491, § 22; Fed. Personnel Mgt. Project, Option Paper No. 4 (Sept. 20, 1977), *reprinted in* Legis. History of the Fed. Serv. Labor-Mgt. Relations Statute, Title VII of the Civil Service Reform Act of 1978, 1351, 1371 (1979); Richard A. Merrill, *Procedures for Adverse Actions Against Fed. Employees*, 59 Va. L. Rev. 196, 209-210 (Feb. 1973).

employees lacked recourse even in these circumstances because they were exempted from civil service protections by executive order or regulation.[5]

Moreover, the standard for determining the legitimacy of agency decisions within this limited universe of "adverse actions" was phrased in general terms under the system that was in place in 1974. The CSC had the authority to order agencies to withdraw an adverse action if it concluded that it was not taken "for such cause as will promote the efficiency of the [civil] service." *See* 5 C.F.R. §§ 752.104(a), 752.401 (1970). As of 1974, however, the CSC regulations contained no specific remedies for reprisal, except in the context of Title VII, and those remedies stemmed from Congress' extension of that law to the federal sector two years earlier.[6] *See* Equal Employment Opp'y Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

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[5] *See* E.O. 10,987 at § 5(a) ("This order shall not apply to the Central Intelligence Agency, the National Security Agency, the Atomic Energy Commission, and the Tennessee Valley Authority"); 5 C.F.R. § 752.102(a) (1970) (CSC regulation excluding several classes of employees from adverse action rules, including, among others, those on probationary or trial periods, temporary and term appointment employees, and most employees of the legislative or judicial branch); E.O. 11,491 at § 22 (adverse action rights extended to non-veteran employees in accordance with CSC regulations).

[6] While employees pursuing appeals of adverse actions were to "[b]e assured freedom from . . . reprisal," under the general civil service regulations in effect in 1974, *see* 5 C.F.R. § 771.211(a) (1965), there was no remedy provided for violation of this general provision. Moreover, the "assurance" was only against reprisal occurring in connection with appeals of *adverse actions* before the CSC, not the filing of discrimination claims.

In NTEU's experience, the most common tools of retaliation fall short of punitive actions such as removals or demotions. Instead, reprisal is usually effected by methods such as giving employees poor performance appraisals, denying them promotions or other job benefits, and making undesirable changes in their duties or working conditions. *See* EEOC Compl. Manual, 8-II(D)(1) (May 20, 1998).[7] None of these methods involve "adverse actions." Therefore, if Congress had not intended to provide employees with statutory protection against retaliation for filing age discrimination complaints when it extended the ADEA to the federal workforce in 1974, it would have left federal employees without recourse where they suffered the most common forms of reprisal.

B. Given this state of affairs, it is simply implausible to contend that Congress did not intend to provide meaningful protection against retaliation to federal employees who filed ADEA claims. Indeed, as petitioner describes in her brief (at 21-24), Congress had already shown its dissatisfaction with the existing patchwork system of remedies when it extended Title VII to the federal sector in 1972. Congress had not been content to relegate claims of race discrimination or related retaliation to the outmoded and ineffective system; it charged the CSC with enforcing the new statutory prohibitions

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[7] Other non-"adverse actions" that are used to effect illegal retaliation include "threats," "reprimands," and "harassment or other adverse treatment." EEOC Compl. Manual, 8-II(D)(1) (May 20, 1998); *see also Shaw v. Blair*, 2007 EEOPUB LEXIS 3338 (citing *Roberts v. Dep't of Transp.*, EEOC Appeal No. 01970727 (September 15, 2000)) ("It is also well-settled that harassment based on an individual's prior EEO activity is actionable.")

through new regulations. The notion that it intended that any less protection would be provided for age discrimination claims defies common sense and is inconsistent with the views of every administrative agency to have considered the issue over the last 30 years (including the CSC, which issued regulations to prohibit reprisal shortly after the ADEA was extended to the federal workforce in 1974).[8]

II. WHEN CONGRESS ENACTED THE CSRA IN 1978, IT EXPRESSLY PRESERVED FEDERAL EMPLOYEES' RIGHTS TO PURSUE RELIEF IN COURT UNDER THE ADEA

Four years after it extended the protections of the ADEA to the federal workforce, Congress enacted the Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 1111 (1978). The CSRA created a "new framework for evaluating adverse personnel actions against [federal employees]." *Fausto*, 484 U.S. at 443.

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[8] *See Gorman v. Sec'y of Health & Human Serv., Soc. Sec. Admin.*, 1997 EEOPUB LEXIS 459 (decision of Equal Employment Opportunity Commission holding that ADEA prohibits retaliation against federal employees); 29 C.F.R. § 1614.101(b) (2007) (acknowledging EEOC jurisdiction over complaints of retaliation brought under the ADEA); *Parnell v. Department of the Army*, 58 M.S.P.R. 128 (1993) (Merit Systems Protection Board holding that statutory prohibition on discrimination based on, among other things, age encompasses a claim of retaliation); 5 C.F.R. § 1810.1 (2007) (Office of Special Counsel policy of referring to the EEOC complaints alleging that an agency committed a prohibited personnel practice by discriminating against an employee); http://www.osc.gov/documents/forms/osc11.htm (last visited on October 30, 2007) (complaint form noting that claims of reprisal arising from employees' pursuit of relief under anti-discrimination statutes are included in the referral policy).

Significant for purposes of this case, while the CSRA allows employees to raise complaints alleging discrimination or related retaliation through its administrative procedures, Congress expressly preserved federal employees' pre-existing remedies, including the right to district court review, for claims that are grounded in Title VII, the ADEA, the Equal Pay Act, and the Rehabilitation Act. *See* 5 U.S.C. § 2302(d)(2). Section 2302(d)(2) of the CSRA thus provides that the CSRA's procedures for challenging "prohibited personnel practices" (which include statutorily prohibited forms of discrimination as well as retaliation for pursuing complaints involving such discrimination)[9] "shall not be construed to extinguish or lessen . . . any right or remedy available to any employee or applicant for employment in the civil service" under the anti-discrimination statutes, including "section 12 and 15 of [the ADEA] . . . prohibiting discrimination on the basis of age. . . ." *Id.*

This explicit language guaranteeing access to the pre-existing statutory causes of action under the anti-discrimination statutes further evinces a congressional policy of providing federal employees a complete set of remedies, including the right to bring an action in district court, for violations of Title VII and the ADEA. Indeed, the CSRA preserved the unique provision of the ADEA that permits federal employees to pursue a civil action in court without exhausting any administrative remedies at all, an opportunity for immediate judicial review that is not available under other anti-discrimination statutes.[10]

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[9] *See* 5 U.S.C. §§ 2302 (b)(1), (b)(9)

[10] *See* 29 U.S.C. § 633a(d) (providing that civil action may be pursued without filing administrative complaint first, as long as

The solicitude with which Congress treated employment claims grounded in the anti-discrimination statutes, and specifically in the ADEA, undermines the inherent premise of the First Circuit's decision in this case—that Congress intended claims of reprisal to be addressed exclusively through administrative procedures.

III. THE FIRST CIRCUIT'S DECISION WOULD DEPRIVE FEDERAL EMPLOYEES OF ADEQUATE PROTECTION AGAINST REPRISAL FOR FILING ADEA CLAIMS AND WOULD RESULT IN WASTE AND INEFFICIENCY ARISING OUT OF THE BIFURCATED CONSIDERATION OF AGE AND REPRISAL CLAIMS

Despite Congress' clear intent that the CSRA not affect employees' rights to pursue anti-discrimination claims in district court, under the First Circuit's decision, federal workers' claims of retaliation for filing age discrimination claims would be relegated to the administrative procedures established under the CSRA. This result is extremely problematic for a number of reasons. First, as outlined below (at 14-20), employees lack control over the pursuit of most retaliation claims under the CSRA's administrative processes and have no right to judicial review, except in limited circumstances. Second, a

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plaintiff provides EEOC 30 days' notice of intent to sue); 29 C.F.R. § 1614.201(a) (2007); *Matheny v. Ashcroft*, 2005 EEOPUB LEXIS 1921 (noting that the ADEA "does provide for an opt-out provision, whereby a complainant is able to proceed directly to District Court, instead of first proceeding through the administrative process, after providing notice to the Commission").

sizable portion of the federal workforce, including postal employees like the petitioner, does not have access to some or even any of the CSRA's administrative remedies. Third, the government's argument creates inefficiencies and anomalies in the prosecution of EEO cases in the federal sector by making it impossible for employees to pursue their age discrimination and retaliation claims in the same forum without sacrificing their right to pursue their underlying age discrimination claims in district court.

A. The Remedies Available Under the CSRA Do Not Afford Adequate Protection Against Retaliation for Filing Age Discrimination Complaints

As mentioned, in enacting the CSRA, Congress established a new administrative scheme for addressing employment disputes. Federal employees can raise claims of retaliation for filing an ADEA complaint within that scheme. As described below, however, the procedures and remedies available under the CSRA are inadequate and inferior to the right of action provided by the ADEA, which is undoubtedly why Congress chose to preserve the pre-existing remedies available to federal employees under the ADEA when it enacted the CSRA.

1. As under the pre-CSRA system (*see, supra, at 6-9*), employees may obtain administrative review of adverse actions. *See* 5 U.S.C. §§ 7513(d), 7701. Such review is obtained by filing an appeal with the MSPB. *See id.* Judicial review of the MSPB's decision in adverse action Cases is available in the Federal Circuit, under a deferential appellate standard. *See id.* at § 7703(b)(1) (Board's decisions on adverse

actions appeals reviewable in the U.S. Court of Appeals for the Federal Circuit).

A special procedure applies to "mixed cases," in which an employee asserts discrimination as a defense to an adverse action. *See Valentine-Johnson v. Roche*, 386 F.3d 800, 805-06 (6th Cir. 2004). As the D.C. Circuit has described, Congress adopted a "complicated tapestry" for mixed cases, with judicial review available at the end, either in the district court or the Federal Circuit. *See Butler v. West*, 164 F.3d 634, 638-39 (D.C. Cir. 1999), *quoted in Valentine-Johnson*, 386 F.3d at 805-06.

The "mixed cases" procedures are currently available to federal employees alleging retaliation under the ADEA. Under the First Circuit's decision, however, such cases would be treated as pure adverse action cases, with review in the Federal Circuit. While employee in adverse action cases would thus have at least some form of judicial review, the fundamental problem remains: retaliation normally does not take the form of an adverse action and employees would therefore be limited to the inferior "prohibited practice" remedies discussed below.

2. The CSRA treats retaliation that does not take the form of an "adverse action"[11] as a "prohibited personnel practice" under 5 U.S.C. § 2302(b)(9)(A). That provision makes it a prohibited personnel practice to "take or fail to take . . . any personnel

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[11] When it enacted the CSRA in 1978, Congress reduced from 30 to 14 the number of days of a suspension that would constitute an "adverse action" and specified that a furlough would only be considered an adverse action if it lasted no more than 30 days. *See* 5 U.S.C. § 7512. The other adverse actions —removal and reduction in grade/rank or pay—remained unchanged.

action against any employee or applicant for employment because of the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation." *Id.* The procedures provided by the CSRA to challenge prohibited personnel practices are not within the control of injured employees. Further, judicial review of claims alleging the commission of prohibited personnel practices is generally unavailable.

a. Most (but not all)[12] federal employees may pursue a prohibited personnel practice claim by filing a complaint with the United States Office of Special Counsel (OSC). *See* 5 U.S.C §§ 1212(a)(2), 1215. OSC regulations provide, however, that the agency defers prohibited personnel practice complaints alleging discrimination under Title VII or the ADEA to the EEO process. *See* 5 C.F.R. § 1810.1 (2007). Further, like the other agencies responsible for addressing discrimination-related disputes in the federal sector (EEOC and MSPB), OSC considers complaints alleging retaliation for filing an ADEA complaint to be encompassed by the ADEA; accordingly it defers retaliation complaints to the EEO process as well. *See, supra,* at 10 n.8.

Assuming OSC were incorrect in deferring retaliation claims under the ADEA to the EEOC, its procedures for resolving complaints alleging the commission of prohibited personnel practices would be inadequate to protect age discrimination complainants who suffer retaliation. Under Title 5, if OSC determines after an investigation that there are reasonable grounds to believe that a prohibited

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[12] Employees of government corporations, for example, may not file complaints with OSC. *See, infra,* at 22-23.

personnel practice has occured, it may recommend that an agency take corrective action. *See* 5 U.S.C. § 1214(a); § 1214(a)(1)(A), (b)(2)(B). It may exercise its discretion to petition the MSPB to order the agency to take corrective action where the agency declines to do so voluntarily. *See id.* at § 1214(b)(2)(C). OSC is not required to pursue cases where an agency declines to voluntarily provide relief, however, and there is no judicial review of OSC's decision not to pursue a prohibited personnel practice complaint. *See* 5 U.S.C. § 1214(c) (providing for judicial review only of final orders or decisions of the MSPB); *see also Carson v. United States Off. of Spec. Couns.*, 2006 U.S. Dist. LEXIS 17055 (D.D.C.), *appeal dismissed*, 2006 U.S. App. LEXIS 20690 (noting that only under extraordinary circumstances may OSC actions be challenged in court by mandamus, and mandamus action not available to challenge OSC's discretionary determinations). Statistics show, in fact, that only a very small percentage of prohibited personnel practice complaints are ever actually prosecuted by OSC.[13]

If OSC declines to petition the MSPB for corrective action, or closes the case because it finds no reasonable basis to believe a prohibited personnel practice has occurred, the employee has no further

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[13] *See* U.S. Off. of Spec. Couns. Fiscal Yr. 2006 Annual Rep., at 27, available at http://www.osc.gov/documents/reports/ar-2006.pdf (last visited on Oct. 17, 2007) (showing that OSC sought an order from the Board directing an agency to take corrective action in three cases during the five-year period running from 2002-2006); *id.* at 22 (showing that during the same five-year period, 8889 complaints of prohibited personnel practices were received by OSC).

recourse.[14] Thus, if a federal employee files a complaint with OSC alleging a prohibited personnel practice under 5 U.S.C. § 2302(b)(9) based on retaliation arising from pursuit of an age discrimination complaint, he or she would have to rely entirely on OSC's willingness to seek relief on his or her behalf. Moreover, judicial review would be available only in the rare instances where: (a) OSC investigates the complaint and finds reasonable cause to believe that a prohibited personnel practice occurred; (b) OSC recommends that the agency take corrective action; (c) the agency declines to take the corrective action; (d) OSC petitions the MSPB to order the agency to take the action; and (e) the MSPB declines to order the agency to take the corrective action. *See* 5 U.S.C. §§ 1214(c), 7703.

b. Prohibited personnel practice complaints may also be pursued through the negotiated grievance-arbitration procedure by employees who are covered by collective bargaining agreements. *See* 5 U.S.C. § 7121(g). But that procedure, like the OSC process, similarly divests the victim of retaliation of control over his or her claim.

Thus, if the grievance is denied, only the union has the authority to invoke arbitration. *See* 5 U.S.C. § 7121(b)(1)(C)(iii). The union's statutory obligation is to represent the collective interests of its members; it may reasonably decide not to pursue arbitration over the objection of the employee based on considerations such as limited resources, com-

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[14] Except in cases involving retaliation for whistleblowing under 5 U.S.C. § 2302(b)(8), employees may not pursue an individual right of action before the MSPB to challenge the commission of a prohibited personnel practice.

peting interests, and a desire to maintain harmony among employees and their employer. *See* 5 U.S.C. § 7114(a)(1); *see also Pyner v. Tractor Supply Co.*, 109 F.3d 354, 362 (7th Cir.), *cert. denied*, 522 U.S. 912 (1997). If the union were to decline to invoke arbitration, the matter would be closed, because the employee would be barred from pursuing any other remedy. *See* 5 U.S.C. § 7121(d), (g)(1) (providing that employee may elect to pursue a prohibited personnel practice claim through either the negotiated grievance process or the statutory process, but not both). So long as the union does not engage in invidious discrimination, its decision whether to invoke arbitration is virtually unreviewable.[15]

Moreover, even if the union were to invoke arbitration, arbitral proceedings are informal and discovery is extremely limited.[16] An arbitrator also

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[15] *See Am. Fed'n of Gov't Employees, Local 3529 and Cyncynatus*, 31 F.L.R.A. 1208, 1224 (1988) ("[W]here union membership is not a factor, the standard for determining whether an exclusive representative has breached its duty of fair representation under section 7114(a)(1) is whether the union deliberately and unjustifiably treated one or more bargaining unit employees differently from other employees in the unit. That is, the union's actions must amount to more than mere negligence or ineptitude, the union must have acted arbitrarily or in bad faith, and the action must have resulted in disparate or discriminatory treatment of a bargaining unit employee.")

[16] *See* Mandatory Binding Arb. & Employment Discrim. Suits, EEOC Compl. Man. (BNA) No. 226 at N:3104; Reginald Alleyn, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 Hofstra Lab. L. J. 381, 411 (1996). *Accord, Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995) (noting

lacks the broad remedial authority available under the ADEA when he or she instead resolves a claim of retaliation as a prohibited personnel practice. When resolving a claim brought under the ADEA, the arbitrator stands in the shoes of the court and may award make-whole relief, including for example, front pay.[17] On the other hand, his or her authority for remedying prohibited personnel practices is derived from the Back Pay Act, 5 U.S.C. § 5596, and is limited to ordering relief that reconstructs what the agency would have done had it not violated the law, which could not include an award of front pay. *See United States Dep't of Treas., Bureau of Engraving & Printing, Washington, DC and NTEU*, 53 F.L.R.A. 146 (1997).

Finally, if the grievance is arbitrated and if the union does not prevail, an employee has the right to seek judicial review only if the retaliation took the form of an adverse action.[18] Otherwise, it is up to the union alone to decide whether to appeal the arbitrator's decision by filing exceptions with the Federal Labor Relations Authority (FLRA). *See* 5 U.S.C. §§ 7121(b)(1), 7122. Judicial review of the

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remedies and procedural protections in arbitration differ significantly from those available in litigation).

[17] *See Lewis v. Fed. Prison Industries, Inc.*, 953 F.2d 1277, 1279 (11th Cir. 1992), *cf. United States Dep't of Just., Fed. Bureau of Prisons, Metropolitan Detention Ctr., Guaynabo, PR and Am. Fed'n of Gov't Employees, Council of Prisons Local, Local 4052*, 59 F.L.R.A. 787, 792-93, *reconsideration denied*, 60 F.L.R.A. 88 (2004) (noting that arbitrator has broader authority to order relief under Title VII than he would if grievance alleged only a contractual violation).

[18] Arbitrator decisions on adverse actions are reviewable directly in the Federal Circuit, just as MSPB decisions are. *See* 5 U.S.C. § 7121(f).

FLRA's decisions on exceptions to arbitral awards would not be available for retaliation claims, because such claims do not involve an unfair labor practice. *See id.* at §§ 7116(a)(1)-(8), 7123.

Given these features of the grievance-arbitration process, this Court has long held that it would be contrary to the congressional policies that underlie the anti-discrimination laws to relegate individual employees to the collectively bargained grievance-arbitration procedure to vindicate their statutory rights. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (observing that "Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. . . . [O]f necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII.")[19] The Court's recognition of the limitations of the grievance-arbitration mechanism strongly counsels against the First Circuit's conclusion that federal employees have no right under the ADEA itself to challenge retaliation.

B. Because There Are Gaps in the CSRA's Coverage, Many Federal Employees Would Have No Remedy at All for ADEA Retaliation Under the First Circuit's Holding

Not only does the CSRA's remedial scheme afford inadequate protection from retaliation, but there are tens of thousands of federal employees who lack access

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[19] *See also Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 743 (1981) (FLSA); *Pyner*, 109 F.3d at 362 (anti-discrimination statutes).

to all or some of its remedies, such as they are. For those employees, their only protection against all or most forms of retaliation arising from pursuit of an age discrimination claim is that afforded by the ADEA.

1. The CSRA expressly exempts several agencies from coverage of its provisions that would otherwise have afforded employees of those agencies an administrative remedy if they were subjected to illegal retaliation arising from pursuit of an age discrimination claim. *See* 5 U.S.C. §§ 2302(a)(2)(C)(ii); 7103(a)(3); 7511(b)(7), (8) (exempting, among others, the Government Accountability Office, Federal Bureau of Investigation, Central Intelligence Agency, National Security Agency, and Tennessee Valley Authority). Employees of these agencies cannot bring retaliation complaints to OSC, cannot engage in collective bargaining (and therefore have no negotiated grievance remedy), and cannot appeal adverse actions to the MSPB. They can, however, bring claims against their agencies under anti-discrimination statutes. *See, e.g.*, 29 U.S.C. § 633a(a) (making ADEA applicable to *all* executive agencies, as defined in 5 U.S.C. § 105, and to certain non-executive agencies, such as GAO). The ADEA, therefore, offers the only source of protection from retaliatory personnel actions taken against individuals in these agencies who complain of age discrimination.[20]

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[20] The ADEA is also the only source of a retaliation remedy for 43,000 Transportation Security Officers (TSOs) working as airport screeners for the Transportation Security Administration (TSA). When Congress created TSA, it authorized the agency to exempt its screeners from the CSRA's coverage. TSOs, therefore, may not seek relief under the CSRA's administrative procedures or under a union-negotiated contract.

2. Employees of government corporations, such as the Federal Deposit Insurance Corporation (FDIC) (*see* 5 U.S.C. § 103), also rely on the ADEA for protection from retaliation. *See* 29 U.S.C. § 633a(a) (incorporating definition of "executive agency" in 5 U.S.C. § 105, which includes "Government corporations"). While government corporation employees may appeal adverse actions to the MSPB (*see* 5 U.S.C. § 7511(b)), they may not file a complaint with OSC in the event they face retaliation that is manifested as something other than an adverse action. *See* 5 U.S.C. § 2302(a)(2)(C)(i). Accordingly, if the Court were to adopt the interpretation of the ADEA offered by the government in this case, employees of government corporations would have no legal or administrative remedy for retaliation arising from pursuit of an age discrimination complaint that takes a form other than an adverse action.[21] As

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See Conyers v. MSPB, 388 F.3d 1380 (Fed. Cir.), *reh'g and reh'g en banc denied*, 2004 U.S. App. LEXIS 27471, *cert. denied*, 543 U.S. 1171 (2005) (MSPB lacks jurisdiction to consider appeal filed by screener); *Am. Fed'n of Gov't Employees v. Loy*, 367 F.3d 932 (D.C. Cir. 2004) (upholding directive declaring TSA screeners ineligible to participate in collective bargaining). They have, however, obtained relief for retaliation under anti-discrimination statutes. *See Loomis v. Chertoff*, 2007 EEOPUB LEXIS 2299; *Hitchcock v. Chertoff*, 2007 EEOPUB LEXIS 1654. If no retaliation remedy was available under the ADEA, then TSOs would be without any recourse if they are subjected to retaliation for having pursued an ADEA complaint.

[21] Employees in government corporations who are represented by a union may have a contractual remedy for such retaliation. For example, a contractual remedy would be available to the 3000 NTEU-represented employees of the FDIC. For the reasons discussed above (at 17-20), grievance remedies do not afford adequate protection from retaliation for filing age discrimination complaints.

discussed above (at 6-10), that result would be contrary to Congress's intent to eliminate barriers to federal employment for older workers.

3. Postal Service employees are also largely exempt from Title 5. Under the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970), which has been in place at all times relevant to this lawsuit, only some postal workers have access to any kind of remedy under Title 5. *See Hall v. United States Postal Serv.*, 26 M.S.P.R. 233, 235-36 (1985). Management officials and employees with a veterans preference (called "preference eligibles," *see* 5 U.S.C. § 2108(3)) may appeal adverse actions imposed by the Postal Service to the MSPB. *See* 39 U.S.C. § 1005(a)(2), (4); *Hall*, 26 M.S.P.R. at 235-36 (citing *Bredehorst v. United States*, 677 F.2d 87, 88-89 (1982)). The same judicial review provisions applicable to MSPB decisions concerning non-postal employees apply. *See, supra,* at 13-14. Bargaining unit employees who are not "preference-eligibles" may not pursue appeals of adverse actions before the Board. *See Hall*, 26 M.S.P.R. at 235-36 (citing *Winston v. United States Postal Serv.*, 585 F.2d 198, 206 (7th Cir. 1978)).

There is no remedy under the CSRA for any postal worker who wishes to challenge a retaliatory action that does not constitute an adverse action. *See Booker v. MSPB*, 982 F.2d 517, 519 (Fed. Cir. 1992), *cert. denied*, 510 U.S. 862 (1993) (Postal Service is not an "agency" subject to the prohibited personnel practice provisions of 5 U.S.C. § 2302); *see also* http://www. osc.gov/ppp.htm#q4 (last visited Oct. 17, 2007) (noting that OSC has no jurisdiction over Postal Service employees except to address nepotism charges). The only remedies for these types of actions

for bargaining unit employees are those available under the negotiated grievance procedures, assuming their union has successfully negotiated contractual protections from reprisal arising from pursuit of an age discrimination claim. As discussed above (at 17-20), relegating retaliation claims to the negotiated grievance process is inconsistent with Congress' goal of eliminating barriers to federal employment for older workers.

C. The First Circuit's Decision Would Result in Inefficiencies and the Inconsistent Adjudication of ADEA Claims by Forcing Related ADEA Claims Arising Out of the Same Operative Facts To Proceed on Separate Litigation Tracks

Under current law, a federal employee may pursue an age discrimination claim and a related retaliation claim simultaneously, in a consolidated action, first through the EEO process and then in district court. Under the First Circuit's decision, however, if an employee filed an age discrimination charge with the EEOC or pursued a claim in district court, neither the EEOC nor the court would have jurisdiction over the retaliation claim. The retaliation claim would have to be pursued through an appeal with the MSPB (if it involved an adverse action), or through filing a complaint with OSC or a grievance under the union contract, as described above.

This unwieldy bifurcated approach to litigating inextricably linked claims wastes the resources of all involved. There are common elements of proof in both age discrimination and retaliation claims. For example, in order to prove retaliation, the com-

plaining party must show a good faith reasonable basis for his or her underlying claim of age discrimination.[22] Further, the same witnesses often have material information about both the underlying age claim and the retaliation claim, and both claims often involve a series of related events. Under the First Circuit's approach, however, unless an employee gave up his or her critical right to pursue his age claim through the EEO process that culminates with a right to go to district court, different tribunals would be deciding the same or similar issues. This process would be wasteful and duplicative and could easily result in conflicting interpretations of the law in a single case.

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[22] *See, e.g., Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 (5th Cir. 2007); *Weeks v. Harden Mfg. Co.*, 291 F.3d 1307, 1311-12 (11th Cir. 2002).

CONCLUSION

For the foregoing reasons, *amicus curiae* NTEU hereby requests that the Court reverse the decision of the court of appeals and rule in favor of the petitioner Gomez-Perez.

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